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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN MONTANO FUERTE,

Defendant and Appellant.

G042922

(Super. Ct. No. 07WF2829)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Adrian Montano Fuerte of forcible rape (Pen. Code, § 261, subd. (a)(2); all further statutory references are to the Penal Code) assault with the intent to commit sexual assault (§ 220), two counts of misdemeanor sexual battery (§ 243.4, subd. (e)(1), and misdemeanor battery (§ 242). Each count involved a different woman. The court sentenced him to 14 years in prison. The only issue defendant raises on appeal is the insufficiency of the evidence on the rape conviction. We affirm.

## FACTS

Because the rape count is the only conviction defendant appeals, we recite the facts only as relevant to that incident. Laura H. (victim) took her car to an Econo Lube where defendant worked as a mechanic; she told him she wanted an oil change. Awhile later defendant approached the victim in the waiting area and asked her to accompany him to the service bay so he could show her some needed repairs. While the two stood in the bay, defendant put his hands on the victim's waist and shoulders. After she told defendant she only wanted an oil change, he asked about her marital status; she told him she was divorced. She went to the waiting room.

Defendant then returned to the waiting area and told the victim he had found something else that needed repair. She again accompanied him to the service bay. Defendant stood behind her, put his hands on her waist and shoulders, and pointed her to the area in the car he claimed needed service. He pressed his penis against her buttocks, started biting and kissing her ear, and tried to turn her around. The victim asked what he was doing and told him to stop; he did not. When she attempted to move away he pulled her closer and pushed her up against a wall. He then put his hands into her pants and his fingers in her vagina. She again told him to stop, saying, "there's people here. You can't do this. Someone has to see you doing this." Defendant told her to be quiet and

continued. The victim yelled “hello,” hoping someone would be around. Defendant again told her to be quiet. During this time the victim was trying to get away from defendant and continued to say, “No.”

Defendant pulled down his pants. After rubbing against the victim, he pulled down her pants and underwear. She again told him to stop. The victim was able to break free, falling to her knees, but defendant picked her up and penetrated her vagina with his penis several times, ejaculating inside her. As this was occurring the victim “was trying to reason with” defendant and kept saying, “No. Stop. I don’t want to do this.” Defendant told her to “[h]old still” and “[b]e quiet.” The victim did not resist any more than described because she “froze” and “disassociated.” She had learned to do this when she was molested as a child.

When defendant was finished he put his pants on and told the victim to “[h]urry up.” She got dressed and left the service bay. She paid the bill after defendant prepared it; she did so in order to retrieve her keys so she could leave as fast as possible. The victim drove across the street to her son’s school where she need to sign some papers; she was unable to do so because her hand was shaking so badly. When she went to the restroom to clean up she found blood and semen. Hysterical, she left the school with her friend, who had been there as well. She told her friend she had been raped. She then went to an emergency room where she was examined for sexual assault. She described pain in her labia and lower abdomen, but no injuries were found. A DNA test found the semen matched defendant’s.

## DISCUSSION

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, [we] ‘presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

It is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Further, “[u]nless it is clearly shown that ‘on no hypothesis whatever is there sufficient substantial evidence to support the verdict’ the conviction will not be reversed. [Citation.]” (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) “[I]f the circumstances reasonably justify the . . . findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

“Forcible rape is defined as ‘an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [¶] . . . [¶] . . . [w]here it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.’ (§ 261, subd. (a)(2).)” (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022, fn. omitted.)

In addition to being instructed with the elements of forcible rape, the jury was told that “defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented.” Defendant claims the prosecution did not meet this burden.

He first relies on evidence adduced at trial in some of the other counts that when he began to touch the women and they “told him clearly and unequivocally to stop or walked away from him,” he did not pursue them. He did not threaten the women or try

to keep them from leaving the service area. He notes the victim's lack of resistance, pointing out he did not know the reason she froze or that she was dissociating. This, he concludes, shows he "actually and reasonably believed" the victim consented.

This argument does not persuade. The evidence shows the victim repeatedly told defendant to stop, both when he pulled her pants down and when he penetrated her, and tried to get away from him. The fact she stopped struggling at some point makes no difference. A rape victim need not resist. (*People v. Griffin, supra*, 33 Cal.4th at p. 1024-1025.) Even if he was "less than sophisticated or educated" as he seems to suggest, and believed the victim consented, the evidence of the victim's lack of consent confirms this was not a reasonable belief. That the victim did not act traumatized after the rape has no bearing on whether defendant believed she consented.

Defendant also relies on the lack of evidence of physical harm to the victim or that he used "restraint during the sex act." This, he argues, shows he did not use force. But, "[i]n a forcible rape prosecution, the kind of force necessary need not be substantially different or greater than the physical force normally inherent in an act of consensual sexual intercourse: 'To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261 . . . , the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." [Citation.]' [Citation.]" (*People v. Mejia* (2007) 155 Cal.App.4th 86, 99-100.) """"*The kind of physical force is immaterial; . . . it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.*"" [Citations.]" (*People v. Griffin, supra*, 33 Cal.4th at p. 1024.) Defendant did use force. He pushed the victim against a wall and, when she fell down trying to get away, he pulled up her by her armpits and then penetrated her.

Further ""the fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape

primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that "force" cause physical harm. Rather, in this scenario, "force" plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.' [Citation.]" (*People v. Griffin, supra*, 33 Cal.4th at p. 1025.)

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.